No. 08-838

Supreme Court, U.S.
FILED
FEB 6 - 2009
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

NAVEEN JAIN AND ANURADHA JAIN,
Petitioners,

v.

J.P. MORGAN SECURITIES, INC.,
WILSON SONSINI GOODRICH & ROSATI, P.C.,
AND PERKINS COIE, LLP,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

RESPONDENT PERKINS COIE, LLP'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

To the extent the Court has jurisdiction to consider the issue framed in the petition given the alternative state law grounds relied upon by the Washington state courts in dismissing petitioners' claims, the question presented is:

Does the federal policy precluding indemnity for potential violations of Section 16(b) of the Federal Securities Act, 15 U.S.C. § 78p(b), bar claims under state law seeking to recover the funds paid to settle liability under Section 16(b)?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, respondent Perkins Coie, LLP certifies as follows:

Perkins Coie, LLP, is a Washington limited liability partnership that has no parent company and no person or publicly held corporation owns 10% or more of its stock.

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STATEMENT OF JURISDICTION

Petitioners Naveen and Anuradha Jain ("Jain") sued respondents under Washington law in Washington State Court. Their lawsuit was dismissed on both federal and state grounds. While this Court may have jurisdiction to address the federal issue raised by Jain as to the other respondents,[1] Jain's petition falters on a jurisdictional level with respect to respondent Perkins Coie, LLP ("Perkins").

All of Jain's claims arise under Washington state law, and the Washington courts relied on Washington state law in holding that Jain failed to state a viable theory of recovery against Perkins. The Washington Court of Appeals held that because "Jain's own conduct caused him to be involved in the litigation . . . they may not recover fees or litigation costs" incurred in defending Section 16(b) claims as damages against all respondents. (Pet. A–18) Further, as the state court dismissed Jains' claims against Perkins for failure to establish causation under Washington State law, there are adequate and independent state grounds for the entire judgment in favor of Perkins and any opinion of this Court on the federal question would be purely advisory.

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[1] Perkins incorporates by this reference the oppositions to certiorari submitted by co-respondents J.P. Morgan Securities, Inc. ("Morgan") and Wilson Sonsini Goodrich & Rosati, P.C. ("Wilson"), because the federal question presented by Jain does not warrant further review.

RESTATEMENT OF THE CASE

The question presented arises from state law claims for negligence and equitable indemnity asserted by Jain in Washington State Superior Court. Jain claimed that respondents' breach of professional duties of care resulted in his liability and subsequent settlement of a claim asserted in federal district court under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b).

In litigation in the U.S. District Court for the Western District of Washington ("Section 16(b) litigation"), the District Court found Jain, the CEO and largest shareholder of Infospace, liable as a matter of law under Section 16(b) for $250 million in alleged short swing profits and interest.[2] The District Court ruled on summary judgment that an alleged escrow of InfoSpace stock owned by several Jain family trusts, and the misdeposit of stock owned by tax-shelter trusts created by Jain into Jain's personal brokerage account, were "purchases" of stock for purposes of Section 16(b) because they would not have occurred absent certain acts and omissions on Jain's part:

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[2] Section 16(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78p(b)) ("Section 16(b)") imposes strict liability on insiders who engage in "short swing" trades of securities because the "possibility of [insider trading] abuse was believed to be intolerably great" with respect to transactions occurring within such close temporal proximity. *See* ***Reliance Elec. Co. v. Emerson Elec. Co.***, 404 U.S. 418, 422 (1972).

> The Jains claim that they were victims of a combination of errors and oversights by others. Nonetheless, without the participation of the Jains, the purchases would not have happened. . . . Although the Jains may not have acted in bad faith, they clearly were not diligent in their transactions with the Trusts.

(Pet. A–55).

The District Court ruled on damages and entered judgment as a matter of law. (Pet. A–58-59) Jain appealed the District Court's summary rulings on liability and damages to the Ninth Circuit, and then paid a small fraction of the total judgment to settle the Section 16(b) litigation while his appeal was pending. Jain sued Perkins, the law firm that defended him in the Section 16(b) litigation, Morgan, the lead underwriters of Infospace's IPO, and Wilson, Morgan's counsel, in Washington state court to recover the portion of the judgment that he paid ("settlement damages"), as well as his attorney fees and other losses related to the Section 16(b) litigation

("non-settlement damages").[3] Jain alleged that all respondents were negligent in connection with the InfoSpace stock transactions and that Perkins committed legal malpractice in defending Jain during the liability phase of the Section 16(b) litigation.

The Washington Superior Court granted the respondents' motions to dismiss on both federal and state grounds. First, it held that Jain's creative nomenclature "failed to alter the nature of the . . . claim as a de facto indemnification claim preempted by federal law." (App.-9) Second, it held that Jain's claims for non-settlement damages were barred under Washington common law.

Under principles of equitable indemnity, characterized by Washington courts as the "ABC Rule," a party involved in litigation may recover legal fees, expenses and any related losses from a third party only when the third party's wrongful acts are the *sole* cause of the litigation. *See, e.g.,* ***Woodley v. Benson & McLaughlin, P.S.***, 79 Wn. App. 242, 247-48, 901 P.2d 1070, 1073 (1995) (Party B's action to

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[3] Jain sued Perkins separately from Morgan and Wilson, but the cases were consolidated after the Morgan claims were remanded to state court following removal to federal district court. Jain quotes extensively from dicta in the District Court's remand order to support his position that federal law does not bar his attempt to recover his Section 16(b) losses under Washington common law. However, he ignores the District Court's holding that "Jains' state law tort claims are not necessarily federal in character" and that "[d]efendants' argument that the Jains' claims are really claims for reimbursement or indemnification barred by federal law is a federal question defense." (Pet. A–43)

recover attorney fees and litigation expenses against Party A is barred if Party A's conduct is not the only cause involving Party B in litigation with Party C, particularly if Party B's conduct contributed to its exposure to Party C in litigation), *rev. denied*, 913 P.2d 816 (1996). In light of Jain's admitted acts and omissions in the underlying transactions, which were extensively discussed by the District Court in holding Jain liable in the Section 16(b) litigation,[4] Jain had no viable claim for recovery of attorney fees, litigation expenses, and other non-settlement damages under Washington law. (App.-10)

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[4]The District Court held:

> The Jains signed papers allowing transfer of funds from the GRATs. The Jains caused deposits of trust stock into their personal brokerage accounts by forwarding stock certificates to their personal broker. Mr. Jain promised to place shares of the NJGRAT trust into escrow to fulfill a personal obligation. The fact that the Jains failed to read their brokerage statements, simply signed legal documents without knowing what they were, and mistakenly sent certificates to their personal broker does not make their actions involuntary. . . . [T]he Jains participated in the transfers and retained more than a degree of control over the transactions. Without the participation of the Jains, the transfers would not have happened.

(Pet. A–76-77)

While this ruling on an issue of Washington law is dispositive of Jain's claims to recover non-settlement damages, the Superior Court's separate causation rulings under state law disposed of *all* remaining claims against Perkins. Applying well established principles of Washington law regarding causation in professional malpractice claims, the Superior Court held that Jain had not – and could not – allege or prove causation on two independent grounds.

The Superior Court summarized Jain's allegations "as a series of claims that Perkins failed to fully develop evidence of errors on that part of others regarding the subject transactions." (App.–14) Causation thus involved a "legal determination of the extent to which . . . matters were argued to [the District Court] and whether further evidence or argument" would have changed the outcome on summary judgment. (App.–13-14) The Superior Court held that the evidence and arguments advanced by Perkins in the District Court were sufficient for the District Court to "unders[tand] and reject[] the evidence and arguments plaintiff[s] contend were not advocated," and "that they were of no consequence." (App.–15)

The Superior Court found the District Court's rulings were "succinctly clear that Jain's theory was that they were the victims of a combination of errors, mistakes and oversights by others." The District Court nonetheless "conclu[ded] that Jain's actions alone, regardless of the other actions, were enough" to hold him liable and that "[i]ssues of the mistakes of others of which Jain claimed he was unaware of or innocent were considered and directly rejected as

irrelevant." (App.–14) The Superior Court noted that the "exact theories plaintiff contends Perkins failed to advance" could not establish causation because "[t]he fault of others in regard to the transaction at issue is not a defense to 16(b) liability." (App.–15)

Alternatively, the Superior Court also held that the District Court judgment against Jain was the result of two distinct erroneous legal rulings made by the District Court. After considering the trial and appellate record, the Superior Court held that the Ninth Circuit would have reversed at least two of the District Court's key decisions. First, the record compiled by Perkins on summary judgment "raised at least a fact question whether the escrow was ever created." (App.–17) Second, in calculating damages, the District Court erred in failing to consider an "offsetting obligation to return the shares to the trust or at least impute a purchase price equal to market value at the time of acquisition" that would have reduced or negated any recovery, regardless of liability. (App.–17)

The Washington Supreme Court denied Jain's petition for direct review of the Superior Court's causation ruling. The Washington Court of Appeals affirmed the Superior Court's judgment of dismissal, holding that Jain's claims were de facto claims for indemnification barred under federal law. (Pet. A–16) The Court of Appeals also affirmed the Superior Court's ruling that Jain's claims for non-settlement damages were barred by Washington's "ABC Rule." (Pet. A–16-18) As those rulings were dispositive, the Court of Appeals did not address any of the alternative causation rulings made by the Superior

Court in dismissing Jain's common law claims against Perkins.

Jain sought discretionary review by the Washington Supreme Court of the issues addressed by the Court of Appeals as well as the Superior Court's causation ruling. Once again, the Washington Supreme Court denied review, making the state intermediate appellate court's decision final. (Pet. A–2)

REASONS THE PETITION SHOULD BE DENIED

A. The Washington Court Of Appeals Expressly Relied On State Law In Rejecting Jain's Attempt To Recover His Section 16(b) Fees And Litigation Expenses Under Washington's "ABC Rule."

While respondents Morgan and Wilson demonstrate that the federal question presented by Jain does not warrant review by this Court, Jain's petition fails on a more fundamental level because the Washington Court of Appeals expressly relied upon common law principles of equitable indemnity, or Washington's "ABC Rule," as a basis for affirming the dismissal of Jain's claims for non-settlement damages – all attorney fees and litigation related expenses that Jain incurred as a result of the Section 16(b) litigation in District Court. This Court has consistently refused to review a question of federal law decided by a state court if, as here, "the decision of that court rests on a state law ground that is independent of the federal question and adequate to

support the judgment." ***Coleman v. Thompson***, 501 U.S. 722, 729 (1991).

The Washington Court of Appeals held that, "[i]n addition to being barred as de facto indemnity, the Jains' claims also fail to satisfy the requirements of Washington's 'ABC rule.'" (Pet. A–16) While this aspect of the decision below does not entirely dispose of Jain's claims, the state court's reliance on state law counsels against review by this Court because the state court's causation ruling disposed of Jain's remaining claims against Perkins. As the judgment below rests on alternative state law grounds, this Court should deny the petition.

B. The Decision Of The Washington Superior Court Rejecting Jain's State Law Claims For Lack of Proof of Causation Is An Adequate And Independent Basis To Sustain The Judgment.

The judgment dismissing Jain's claims against Perkins rests on additional independent and alternative state law grounds that the Washington Court of Appeals found unnecessary to address. The Superior Court held, as an alternative basis for dismissal, that Jain was unable to prove the "but/for" causation required of a legal malpractice plaintiff under Washington common law. (App.–12-18) That decision under Washington state law is sufficient to support the judgment in favor of Perkins in its entirety. *See* ***Herb v. Pitcairn***, 324 U.S. 117, 126 (1945) ("our power is to correct wrong judgments, not to revise opinions."); ***Murdock v. City of Memphis***, 20 Wall. 590, 636 (1875) (Court must decide whether

issue of state law can sustain the state court judgment, notwithstanding any alleged error in deciding issue of federal law).

Because the Washington Superior Court held that Jain had no claim as a matter of state law, any decision by this Court that the anti-indemnity policies of Section 16(b) do not bar Jain's state law claims against Perkins would be advisory only. This Court refuses to address an issue of federal law "if the same judgment would be rendered by the state court after we corrected its views of federal laws." ***Herb v. Pitcairn***, 324 U.S. at 126 (1945). "Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." ***Coleman***, 501 U.S. at 729; *see also* ***Lambrix v. Singletary***, 520 U.S. 518, 523 (1997) ("Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory.").

While the Washington Court of Appeals did not need to address the alternative causation rulings of the Superior Court, these alternative grounds, which were largely unchallenged by Jain, would necessarily have to be addressed by the Washington appellate courts before this Court could determine whether "the same judgment would be rendered by the state court after we corrected its views of federal law." ***Herb***, 324 U.S. at 126. Exhaustion of these alternative state law issues in Washington appellate courts would be time consuming and in the end futile, as this Court's precedents demonstrate.

In ***Paschall v. Christie-Stewart***, 414 U.S. 100 (1974), for instance, this Court noted probable jurisdiction to determine whether Oklahoma's tax sale statute comported with procedural due process, only to remand to the Oklahoma Supreme Court to address whether a former mineral deed owners' challenge was nonetheless barred under state law, without deciding the federal issue. The Oklahoma trial court had held the action barred under Oklahoma's statute of limitations, but the state Supreme Court addressed only the federal constitutional question in holding the sale valid. On remand, the Oklahoma Supreme Court rejected petitioner's challenge to the application of the statute of limitations based upon the failure to provide the deed holders notice, holding that the issue had been waived and was not preserved for appellate review. 544 P.2d 505 (Okla. 1974). This Court thus never reached the federal issue, ultimately denying certiorari. ***Paschall,*** 426 U.S. 935 (1976). *See also* ***Kirkpartrick v. Christian Homes of Abiline, Inc.***, 460 U.S. 1074, 1075 (1983) (remanding to the Texas intermediate appellate court to address a "question of state law not passed upon or relied upon below.")

A similar procedural scenario is presented here, where the Superior Court dismissed Jain's claim based on Washington state law that the Washington Court of Appeals did not address because it relied on an alternative federal ground. In order to avoid an advisory opinion, this Court would have to order additional litigation in Washington's appellate courts before Jain could have the slimmest hope of squarely presenting a dispositive federal issue. The

Washington Court of Appeals must first address the Superior Court's causation ruling as an alternative basis for dismissal under state law. Jain's ability to succeed on the causation issue is tenuous at best because the Superior Court's causation ruling was itself based on alternative grounds, any one of which is dispositive.

First, the Superior Court held that Jain could not establish that "but for the malpractice, the trial court results would be better," (App.–12), as required by Washington law. ***Daugert v. Pappas***, 104 Wn.2d 254, 260-63, 704 P.2d 600, 605-06 (1985); *see* ***Geer v. Tonnon***, 137 Wn. App. 838, 844-45, 155 P.3d 163, 166-67 (2007), *rev. denied*, 178 P.3d 1032 (2008); ***Nielson v. Eisenhower & Carlson***, 100 Wn. App. 584, 594-95, 999 P.2d 42, 48, *rev. denied,* 10 P.3d 1071 (2000) (causation decision must be made by trial court as an issue of law based on review of record, where issue decided as a matter of law in underlying action). The Superior Court held that Perkins had advanced and the District Court rejected the "exact theories plaintiff contends Perkins failed to advance" in opposing summary judgment in the Section 16(b) litigation. (App–15) The Superior Court also held that additional evidence or arguments regarding the culpability of Morgan, Wilson or Perkins in the underlying transactions would and could have made no difference to the District Court because "[t]he fault of others in regard to the transaction at issue is not a defense to 16(b) liability." (App–15) Finally, if the District Court erred in granting summary judgment on the record created by Perkins, judicial error, and not the alleged malpractice of Perkins, was the sole proximate cause of Jain's damages. (App.–

16-18) Any one of these Superior Court causation rulings is sufficient to justify affirmance on an adequate and independent state law basis.

Jain's ability to present a justiciable federal issue is further hampered by his procedural defaults in Washington's appellate courts. Jain challenged only the Superior Court's ruling that he could not prove causation because the Ninth Circuit would have reversed critical rulings regarding liability and damages in the Section 16(b) litigation.[5] But the Superior Court found causation lacking for an additional reason – that further evidence and argument regarding the fault of others could not as a matter of law have produced a different outcome on summary judgment. Jain's failure to offer argument on these alternative grounds for dismissal until his

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[5] While this causation ruling arguably involves elements of federal law, the federal issue is "only tangentially relevant to an element of a state tort claim" – the causation element requiring a legal malpractice plaintiff to prove the "suit within the suit." ***Singh v. Duane Morris LLP***, 538 F.3d 334, 337-40 (5th Cir. 2008) (legal malpractice claim alleging counsel failed to introduce relevant evidence in federal trademark litigation did not raise a federal question). Further, because Jain did not challenge the Superior Court's analysis of federal law on appeal, and the Washington Court of Appeals did not address this issue, Jain is now barred from seeking certiorari even were he to attempt to recharacterize the Superior Court's causation ruling as a federal issue. *See* ***Palazzolo v. Rhode Island***, 533 U.S. 606, 631 (2001) (refusing to address issue where "[p]etitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari.").

reply brief in the Washington Court of Appeals is a procedural default that, as in ***Paschall***, would preclude this Court from ever addressing the federal question presented. *See* ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (finding waiver of error on appeal under Washington law when appellant failed to raise issue before reply).

In any event, even a decision by the Washington Court of Appeals that reversed the Superior Court's causation ruling would still not render the federal question ripe for review by this Court. Any aggrieved party would have the right to seek discretionary review by the Washington Supreme Court. Jain's federal issue would be squarely presented only were Jain to prevail in reversing the Superior Court's alternative causation rulings upon termination of review by Washington's Supreme Court.

Given the lower court's reliance on a dispositive state law ground for entry of judgment against petitioner, a decision by this Court on the question presented would be advisory only. This Court should deny the petition.

C. Indemnity Is Not Available To Recover Damages Arising From Prohibited Short Swing Trades Under Section 16(b) Of The Securities Act.

Even if the Court could reach the issue given the alternative state law grounds, the question presented by Jain presents no substantial federal issue for review for the reasons stated by respondents

Morgan and Wilson. There is no split amongst the circuits regarding the application of the federal policy precluding indemnification to those alleged to have violated Section 16(b).

The purpose of Section 16(b) is to deter insider trading by absolutely prohibiting purchases and sales by insiders within six months, because the "possibility of [insider trading] abuse was believed to be intolerably great" with respect to transactions occurring within such close temporal proximity. ***Reliance Elec. Co. v. Emerson Elec. Co.***, 404 U.S. 418, 422 (1972). Liability is strict, and determined without regard to negligence or intent. As a result, Jain's potential statutory liability under Section 16(b) is not subject to allocation under Washington's statutory scheme governing allocation of fault among parties. Wash. Rev. St. 4.22.015 (defining "fault" as acts or omissions "that are in any measure negligent or reckless" or which "subject a person to strict tort liability or liability on a product liability claim.")

Liability under Section 16(b) extends only to the insider, and the fault of others is not a defense to Section 16(b) liability. *See* ***Volk v. Zlotoff***, 285 F. Supp. 650 (S.D.N.Y. 1968) (rejecting defense of reliance on counsel). Indemnity claims undermine these policies, regardless whether the party seeking indemnity has fully disgorged all Section 16(b) profits. Allowing a Section 16(b) defendant to pursue claims for indemnity from Section 16(b) liability would create a "fault-based" regime that is contrary to Section 16(b) and the policies it is intended to further.

Section 16(b)'s policies of deterrence are similarly undermined where a Section 16(b) defendant seeks indemnity for a *potential* securities liability. If a Section 16(b) defendant could settle, as did Jain, then recover all settlement sums, fees, and expenses, corporate insiders could negotiate indemnity agreements and abuse their insider status as a matter of course. Thus, a final judicial determination that the person seeking indemnity is a "securities law violator" under Section 16(b) (or any other federal securities law) can not be a condition to preempting a de facto indemnity claim. *See, e.g.* ***First Golden Bancorporation v. Weiszmann***, 942 F.2d 726 (10th Cir. 1991) (defendant settling Section 16(b) claim before trial barred from seeking indemnity); ***Stowell v. Ted S. Finkel Investment Services, Inc.***, 641 F.2d 323 (5th Cir. 1981) (dismissing claim for indemnification by securities defendant under Rule 12(b)(6) prior to defendant being found liable).

The conflict posited by Jain is illusory and the policies behind Section 16(b) fully support the Washington Court of Appeals decision. The judgment below presents no substantial federal issue for review by certiorari.

CONCLUSION

This Court should deny the petition for the reasons stated here and by respondents Morgan and Wilson.

DATED this 4th day of February, 2009.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: /s/ Howard M. Goodfriend
Howard M. Goodfriend
Counsel of Record

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Attorneys for Respondent Perkins Coie, LLP

APPENDIX

RESPONDENT PERKINS COIE, LLP'S APPENDIX TO BRIEF IN OPPOSITION

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

NAVEEN JAIN and ANURADHA JAIN, husband and wife, and their Marital Community,	No. 03-2-32427-2 SEA (Consolidated with 03-2-34789-2 SEA and 04-2-01655-0 SEA)
Plaintiffs,	
vs.	
JP MORGAN SECURITIES, INC., a Delaware corporation, as successor in interest to Hambrecht & Quist LLC, *et al*,	
Defendants.	
NAVEEN JAIN AND ANURADHA JAIN,	
Plaintiffs,	
v.	
PERKINS COIE LLP,	

TRANSCRIPT OF PROCEEDINGS

Heard before the Honorable Judge Richard A. Jones, at King County Courthouse, 516 Third Avenue, Room E-746, Seattle, Washington

Appearances:

ARTHUR HARRIGAN, JR., TIMOTHY LEYH and LARRY GANGNES, representing the Plaintiffs;

JOHN PERNICK, representing the Defendant JP Morgan Securities, Inc.;

ROBERT SULKIN, representing the Defendant Wilson Sonsini Goodrich & Rosati, P.C.;

KEITH PETRAK, representing the Defendant Perkins Coie LLP.

DATE: May 4, 2006

REPORTED BY: Joanne Leatiota, RPR, CRR CCR# 29906

Seattle, Washington; Thursday, May 4, 2006

MORNING SESSION – 9:16 A.M.

THE COURT: Counsel, we are here for the court's ruling, with this court having previously heard the argument of counsel, read the briefs and taken into consideration the matters now before me.

The court will make its determinations in the same order in which the court addressed the parties for purposes of your argument. In that regard, the first motion will be that of JP Morgan Securities.

The plaintiff filed their third amended complaint, which includes allegations and claims against defendant JP Morgan Securities for negligence, breach of fiduciary duty, equitable apportionment, unjust enrichment, recovery of nonsettlement damages, and equity indemnity.

Defendant JP Morgan has filed a CR 12(b)(6) motion to dismiss. The standard to be applied for such relief requires dismissal if it appears beyond doubt the plaintiff can prove no set of facts consistent with the complaint which would entitle them to relief. Courts are to grant 12(b)(6) motions sparingly, with care. In only unusual circumstances a complaint survives a 12(b)(6) motion if any set of facts could exist that would justify recovery.

The court will address each of the claims' bases for dismissal pursuant to the third amended complaint.

At the last motion to dismiss on the second amended complaint, the court specifically ruled that indemnity is not available for violation of Section 16(b). The legal authority in support of that conclusion was First Golden Bankcorporation and Bunker Ramo-Eltra Corporation and Shaffer.

The third amended complaint of plaintiffs, in essence, is a claim for recovery of amounts they allege

they paid to settle the 16(b) action. The attorney's fees, costs and expenses they allege they incurred as a result of or in connection with the Section 16(b) action, and (c), the other direct, indirect, consequential and special nonsettlement damages incurred or that may incur in connection with the 16(b) suit.

The genesis, in essence, of each of these claims are derived from, associated with or connected to the Jains' Section 16(b) liability. Plaintiffs attempt to distinguish between settlement and nonsettlement damages, alleging the latter as outside the indemnity bar.

The court, having reviewed those claims, concludes, as a matter of law, that these claimed nonsettlement damages are litigation costs incurred as a result of the Section 16(b) action. The plaintiffs have stated no legitimate basis to conclude their attorney's fees and litigation expenses did not arise separately from the Section 16(b) action.

In addition, this court finds persuasive the analysis and argument of Western Community Bank v. Helmer, which the plaintiffs failed to or adequately address in their response or argument to this court.

Moreover, the plaintiffs failed to provide any authority allowing recovery of litigation expenses where the litigant's own acts, independent or not, were a cause in the litigation. As in Helmer, this court concludes that the plaintiffs can recover only if they did nothing to contribute or lead to the litigation.

Even if this court ignores Judge Pechman's findings, the evidence is undisputed that the plaintiffs, one, signed the registration statement with the allegedly erroneous footnote; two, sent the split share certification to JP Morgan instead of the trustee; three, signed the transfer form; and four, made the stock sales which generated the profits they were ordered to forfeit.

In light of the totality of these actions, JP Morgan's acts were not the sole cause of the litigation, and the plaintiff, therefore, cannot state a claim for recovery of litigation expenses.

For the record, the ABC rule does not assist plaintiffs. Dreiling brought the 16(b) action derivative on behalf of InfoSpace. Hence, InfoSpace was, in essence, the plaintiff. Because InfoSpace was involved in all of the transactions that issue in the Section 16(b) action, the Jains cannot meet the requirement of the ABC rule.

Plaintiff's unjust enrichment claim also fails. The restatement of restitution limits recovery to cases where the action of the benefit is consciously tortious. There is no allegation of such, and at best, the plaintiffs concede the acts of JP Morgan were accidental and refer to the misdeposits as essentially an internal filing error. Since plaintiffs have not alleged in the third amended complaint that they paid JP Morgan anything in connection with any of the alleged erroneous transactions, they do not state a claim for unjust enrichment.

Last, the court disagrees that the unjust enrichment claim is time barred. The court will give further explanation as to this ruling in the court's analysis for the Perkins Coie motion.

For all of these reasons, JP Morgan's motion to dismiss the third amended complaint pursuant to the noted authority is granted.

The next motion is that of Wilson Sonsini. The court incorporates by reference, to the extent applicable, the ruling stated in the JP Morgan motion to dismiss in this ruling as well. The third amended complaint specifically seeks the costs and other consideration paid by the Jains, one, to settle the 16(b) suit; two, the attorney fees the Jains incurred in defending the 16(b) suit, and the alleged investment losses associated with the supersedeas bond.

The court concludes, as a matter of law, all of these damages are associated with plaintiff's 16(b) liability and constitute nothing more but a restatement and request for a claim for indemnification.

Second, the Jains' claim for unjust enrichment by Wilson Sonsini equally fails. The plaintiffs did not plead and have asserted no facts that the defendants were enriched at plaintiff's expense. The court would specifically reference Far West Steel as case authority that makes it abundantly clear that proof of such is a necessary element for unjust enrichment.

As to the unjust enrichment claim, plaintiffs allege the legal fees that Wilson Sonsini received while they were representing Hambrecht and Quist and/or InfoSpace. This claim also fails. They have not alleged they paid any of those fees. Hence, absent evidence of unjust enrichment at plaintiff's expense, this claim fails.

On the issue of the collateral estoppel, the reply brief of Wilson Sonsini at page 45, they conclude and state the criteria for collateral estoppel. The thrust of plaintiff's argument against the application of collateral estoppel is premised upon the contention that they were effectively deprived of any defense resulting in an injustice.

The court rejects the argument based upon the analysis of Thompson v. State Department of Licensing at 138 Washington Second 783, and specifically the language of that opinion at pages 795 to 96. Consequently, under Thompson, even if Judge Pechman reached an erroneous result, the Jains are not free to relitigate. To follow Jain's theory would eviscerate the effectiveness of the basic principles of collateral estoppel.

As to plaintiff's case within a case claim, that merely allows the plaintiffs to attempt to assign blame for the adverse 16(b) judgment to their litigation counsel. It does not allow them to replace the adverse 16(b) judgment with a new 16(b) judgment in their favor. Hence, the indemnity bar previously ruled upon equally applies herein.

As to the claim by the Jains that intent is still a relevant factor, that claim fails. This court and Judge Pechman have previously unequivocally ruled that the Jains' lack of intent on the 16(b) is irrelevant. Based upon the authority provided by the parties, it appears the limited authority that considered the issue of intent in this context have concluded that indemnity is unavailable for Section 16(b) violations.

Even if this court were to somehow find intent was relevant on the issue of indemnity, Judge Pechman has already ruled in her findings that the 16(b) violations were voluntary.

As to the unjust enrichment claims, the issue is equally disposed of, as Washington law specifically provides that an unjust enrichment claim is only available where the enrichment is at plaintiff's expense. Since the plaintiff appears to concede they did not pay Wilson Sonsini the legal fees they seek to recover in their unjust enrichment claim, this claim fails as a matter of law. The authority plaintiffs cite to the contrary is not applicable to the facts now before this court. On the investment loss claim, it fails as well and must be dismissed. To the extent the Jains violated Section 16(b), they're not entitled to the $247 million for which judgment was entered against them. They're also precluded by law from the investment income.

For all of the foregoing reasons, Wilson Sonsini's motion to dismiss is granted.

The next motion is that of Perkins Coie's motion to dismiss. There are several different components in the motion to dismiss filed by Perkins Coie, and the court will identify each section and then provide its analysis.

First is the erroneous footnote claim. Perkins Coie has raised a variety of bases in support of its motion to dismiss the second amended complaint. The first pertains to plaintiff's erroneous footnote claim.

On this claim, the court agrees with the defendant Perkins. The second amended complaint, paragraph four, provides that Jains' erroneous footnote claim is based entirely upon Perkins' work on the InfoSpace IPO and not upon the defense of the 16(b) suit. On this claim, Perkins does stand in the same shoes as JP Morgan and Wilson Sonsini. For the reasons stated in the rulings on their motion to dismiss, this court incorporates its findings and rulings herein.

Moreover, this court has previously ruled on the reasons for that ruling, and there are no grounds to overrule or reconsider that ruling. Hence, this court rules that Jains' amendments and second amended complaint failed to alter the nature of the erroneous footnote claim as a de facto indemnification claim preempted by federal law.

Next is Perkins' claim that plaintiffs failed to state a claim to recover litigation fees, expenses and related losses. In reviewing plaintiff's allegations, he presents a variety of causes for his being sued in the 16(b) suit other than Perkins' conduct, which includes InfoSpace, JP Morgan and Wilson Sonsini regarding the escrow claims. Before this court are the admissions and averments regarding Jain's own role in the subject transactions.

Under the theory of equitable indemnification, the liability plaintiff seeks is limited and only available in circumstances where the third party is the sole cause of the first party's involvement in the litigation. Since plaintiff has alleged the conduct of others as one of multiple causes for him being sued, his claim is prohibited.

Next is Jain's unjust enrichment claim. This claim fails as well. The record before this court is void of evidence that the fees related to the IPO came at Jain's expense. The record indicates the fees related to the IPO did not come at Jain's expense; rather, they were paid by InfoSpace.

Absent proof of payment by plaintiff, a critical element of an unjust enrichment claim cannot be met. Hence, defendant Perkins' 12(b)(6) motion on this aspect of their motion is granted.

Perkins also suggests that the alleged wrongful acts in preparing the prospectus occurred in 1998 and early 1999, more than three years before plaintiff filed this suit. Perkins' request for the court to time bar the complaint for exceeding the statute of

limitations is denied when we apply the 12(b)(6) standard to the facts as alleged.

The facts, as pled, raised a fact issue in dispute as to the point at which plaintiff should have discovered the alleged injury. This question, as well as whether plaintiff exercised due diligence in discovering the alleged injury, are ordinarily questions for the trier of fact and improper to rule upon as a matter of law. The court makes this finding, so the record is clear as to the basis for the court's total consideration of Perkins Coie's motion.

Next is the issue of plaintiff's litigation defense claims. Perkins claims the judgmental immunity doctrine bars plaintiff's litigation defense claims. This aspect of Perkins' motion is denied. For purposes of this specific issue, the court has considered plaintiff's allegations of negligence where they provide many allegations of Perkins' claimed negligence.

Under the standards of a 12(b) motion, the factual allegations in the complaint are accepted as true. While speculative, specious claims with no basis cannot be treated with like consideration on this claim, a 12(b)(6) motion would be granted only if it appeared beyond a reasonable doubt that plaintiff could prove no facts consistent with the complaint that would entitle plaintiff to the relief requested.

While Perkins cites a host of claimed tactical judgments, the representation and argument of counsel are an overstatement of the relief contemplated by the judgmental immunity doctrine.

Plaintiff's claim for relief on this basis is therefore denied.

Perkins also claims that plaintiff's litigation expense claims fail because proximate cause is lacking as a matter of law. The plaintiff and Perkins agree that liability for legal malpractice requires proof of a breach of duty as a proximate cause for damage to the client. Both parties also agree that proximate cause elements require cause in fact and legal causation. Both parties also agree cause in fact refers to the "but for" consequences of an act. Here the "but for" test is whether but for the malpractice, the trial court results would be better.

The plaintiff contends if the issues pled raised fact issues on the issue of causation, then it cannot be resolved on a 12(b) motion. This court disagrees. The issues as raised and pled are issues of law.

As noted in the Eisenhower opinion, questions of negligence and proximate causation are usually questions for the jury. However, the unique characteristics of legal malpractice in the circumstances of the instant case make that general rule inapplicable.

As noted in Eisenhower, the line between questions for the judge and those for the jury in legal malpractice actions has generally been drawn between questions of law and questions of fact.

In the instant case, the plaintiffs settled their litigation that was pending appeal before the Ninth Circuit on the issues of the summary judgment ruling

of Judge Pechman. The proximate cause issues in this require special legal expertise in analyzing Judge Pechman's legal conclusions and, therefore, involve questions of law, which this court resolves as follows.

The first of which is the stipulation. This issue revolves on the express terms of the stipulation. This is an issue of law, that is, whether the escrow and misdeposit transactions were purchases under Section 16(b).

The court finds the stipulation did not waive trial of disputed issues of fact, and the District Court did not construe it as such, particularly in light of the two stipulations before Judge Pechman. The stipulation did not involve any disputed fact issues and, therefore, cannot, as a matter of law, have caused any injury.

Moreover, the plaintiff does not state or allege with clarity any stipulated fact that was controverted, at least not in the second amended complaint.

Plaintiffs suggest the waiver of the jury trial addresses this question. However, no such allegation is in the second amended complaint. Moreover even if it was an issue, the failure to demand a jury did not cause the adverse ruling on liability.

The next general category is the evidence and arguments Jain contends Perkins should have advocated. Resolution of this issue is also one of law, as it involves a legal determination of the extent to which such matters were argued to Judge Pechman

and whether further evidence or argument would have changed her mind.

What is abundantly clear from the record and Judge Pechman's ruling is that she was succinctly clear that Jain's theory was that they were victims of a combination of errors, mistakes and oversights by others.

My review of the record is that Judge Pechman's ruling was premised upon conclusions that Jain's actions alone, regardless of the other actions, were enough. Judge Pechman's ruling is also abundantly clear that since Jain's transactions were voluntary, he had a liability.

Issues of the mistakes of others of which Jain claimed he was unaware of or innocent were considered and directly rejected as irrelevant. Judge Pechman's analysis concluded that due to Jain's participation in the transfers and retention of more than a degree of control over the transactions, the transfers could not have happened. Hence, liability was premised upon his actions that she deemed voluntary.

The thrust of Jain's litigation defense negligence by defendant Perkins can be summarized as a series of claims that Perkins failed to fully develop evidence of errors on the part of others regarding the subject transactions.

This court concludes, as a matter of law, that the exact theories plaintiff contends Perkins failed to advance do not satisfy the requirement for causation under the proximate cause component of negligence. The fault of others in regard to the transaction at issue is not a defense to 16(b) liability.

This point is driven home when one considers the analysis of such liability considering cases such as Volk v. Zlotoff, 285 F. Supp. 650, from the Southern District of New York, a 1968 opinion where the court held an insider liable even though he was given erroneous advice regarding application of Section 16(b).

The record before this court is clear, Judge Pechman understood and rejected the evidence and arguments plaintiff contend were not advocated. Moreover, the case authority provided by the parties make it clear to this court that such claims are not a defense under Section 16(b).

Judge Pechman's rulings were succinct and pointed and consistent with applicable 16(b) federal law. The fault of others is not a defense to a 16(b) claim. Hence, plaintiff's second amended complaint does not state facts to indicate the necessary element of proximate cause. It is patently obvious that Judge Pechman in the various proceedings considered the thrust and essence of the very claims now advanced by plaintiff, and they were of no consequence. The actions of plaintiff alone was sufficient to cause his liability.

The last issue on causation concerns the outcome of the Ninth Circuit appeal. The most relevant case on this issue is Nielson v. Eisenhower and Carlson at 100 Washington Appellate 584, a 2000 opinion. Following the principles of that case, this court concludes that the "but for" element of proximate cause can be negated as a matter of law, that the outcome on appeal would have left the plaintiff in as good a position as if there had been no negligence.

The instant case had been appealed to the Ninth Circuit to review the rulings of Judge Pechman. What the Ninth Circuit would have ruled is clearly an issue of law that this court is entitled and required to decide.

The court finds that two issues raised by Perkins are dispositive on this issue. The first is the escrow. The essential issue that was critical to finding Jain liable for the escrow purpose was whether the escrow was ever created.

After considering what was before Judge Pechman, this court concludes that the Ninth Circuit would have reversed her granting of Dreiling's motion in regard to the escrow transaction. Dreiling's evidence was extremely limited. He relied upon a limited number of documents filed by InfoSpace with the SEC; two, limited e-mails between Jain and the board in early 2000; three, Ellen Alben testimony of her suspicions; and four, Perkins' physical possession of the NJ GRAT shares in December 1998.

To the contrary, there appears to be evidence that was in existence that the SEC filings were in error and no stock was ever put into escrow. There is also the evidence which is the declarations of InfoSpace officers and directors indicating the absence of any personal knowledge of the stock being placed in escrow and 30(b)(6) evidence of the inability to find evidence that stock was put in escrow. In addition was the evidence that the NJ GRAT stock was in the trust account from January 1999 onward.

This court concludes that the evidence before Judge Pechman raised at least a fact question whether the escrow was ever created. Applying traditional principles of summary judgment, giving all reasonable inferences to the nonmoving party, this court concludes that the Ninth Circuit would have reversed Judge Pechman's ruling that an escrow was created as a matter of law.

The second significant issue the Ninth Circuit would have had to address would have been the issue of damages. The court in its analysis on this issue does give deference to the existence of and nature of arguments advanced by the SEC in its amicus brief where it supported Jain's contentions that the purchase price had to take into account in these circumstances the offsetting obligation to return the shares to the trust or at least impute a purchase price equal to market value at the time of acquisition.

The decisions of Hertzberg v. Dignity Partners, Inc. at 191 F. 3d 1076, a Ninth Circuit decision, 1999, citing Alderman v. SEC, 104 F. 3d 285, and Auer v. Robbins, 519 U.S. 452, 1997, strongly suggests the Ninth Circuit would be obligated or, at a minimum, strongly encouraged to defer to the SEC's interpretation of 16(b) so long as the interpretations were reasonable.

In this regard, the court concludes that the Ninth Circuit would have reversed Judge Pechman on this aspect of her ruling. Having reviewed and ruled that the Ninth Circuit would have reversed Judge Pechman on these two essential issues of escrow and damage, the court finds the allegations of litigation defense claims to be lacking.

Having made the determinations that the Ninth Circuit would have reversed two of the most significant rulings of Judge Pechman, this court finds the outcome of the appeal in Jain's favor would break the chain of causation and proximate cause element. Consequently, Jain would have improved his position on appeal, and the decision to settle, not the alleged negligence of Perkins, was the cause of his injury.

Having made these rulings, the other issues raised need not be addressed. For the foregoing reasons, defendant Perkins Coie's motion pursuant to 12(b)(6) is granted.

Last for the record is the plaintiff's motion for partial summary judgment. The plaintiff has moved for partial summary judgment to, one, strike as a matter of law a defense that plaintiff's litigation

defense claims are preempted as de facto indemnification claims.

The court construes plaintiff's motion as an indirect approach at the 16(b) indemnification prohibition. The essence of plaintiff's argument is that the presumption doctrine only applies if he is actually liable under 16(b) and the District Court's prior dismissal was based upon the District Court's finding that he was liable.

The court reaffirms in this ruling that the fundamental precepts of the securities laws are abundantly clear, and no indemnification for security violations in whatever form are permitted. Consequently, state law claims which seek damages derived from securities violations are preempted as de facto indemnification claims.

A person accused of violating Section 16(b) cannot seek indemnity for that liability or related settlement by claiming it was the issuer's fault or the fault of a third party claimed to have negligently advised him in regard to the transaction.

In addition, the court agrees there are procedural deficiencies to the motion. Plaintiff's motion relies only upon the allegations in the second amended complaint and asks the court to assume they are true. That is the standard for 12(b)(6) motion, not summary judgment. There is no basis for the court to grant summary judgment on affirmative defense based only upon allegations of the complaint.

Last, the plaintiff asks the court to assume facts as true for purposes of a CR 56 motion. The rules for summary judgment construe the facts in favor of the nonmoving party. In light of the inferences that can be drawn from allegations in the second amended complaint and the record before me, the court can find issues demonstrating no duty to plaintiff.

For example, Perkins represented InfoSpace, not Jain, in the IPO and indemnification agreement and that plaintiff's conduct caused the District Court's rulings. For these additional reasons, partial summary judgment motion is denied.

The court also notes that in footnote 64, page 35, defendant Perkins' reply references CR 56(f). The court does not treat this as a motion for continuance, but the court will nonetheless address it.

The court will deny such a request, as there is no affidavit present, there is no outline of the evidence sought, there is no indication how the evidence sought would support their position. Nevertheless, for the foregoing reasons, the motion for partial summary judgment is denied.

Counsel, the court has indicated a series of rulings. The only order that I have was one that was provided by Perkins Coie. That order is insufficient as far as the extent of materials which were before this court for consideration.

So I'd ask if you do not have orders which adequately include all of the matters which are before this court for consideration that you amend or modify. If you have them now, you can show them to opposing counsel, and the court can sign them. Otherwise I will give you a formal date for presentment of the orders.

MR. PETRAK: I have an order.

THE COURT: Counsel, would you show that to counsel.

MR. PERNICK: Just clarification, your Honor, in the order you want a listing of all the pleadings that were considered?

THE COURT: That's correct, counsel.

MR. PETRAK: My order has every pleading and letter that was submitted, but the substance of the order only addresses the motions dealing with Perkins.

THE COURT: Has counsel signed it?

MR. PERNICK: One other clarification, your Honor. Are these now dismissals with prejudice?

THE COURT: Yes, counsel.

MR. SULKIN: Your Honor, it's my understanding plaintiffs have no problem with my order, other than they want to add a reference to your incorporating your oral ruling into this order.

THE COURT: Counsel, I will give you the court's spin on what happens with courts' findings at the trial court level. Traditionally, the Court of Appeals completely ignores what I have to say. The only thing they want to know is if I have affirmed or denied the request.

You will obviously have the opportunity to submit to the Court of Appeals the basis for this court's ruling in the pleadings you would submit for appellate review. However, for purposes of the order, the only thing I am going to sign today is just the order with the specific rulings. You can cross-reference in subsequent pleadings, if that's the parties desire, what the actual rulings of this court have been.

MR. SULKIN: Thank you, your Honor.

MR. PERNICK: Your Honor, JP Morgan will submit an order to the plaintiffs and then submit it to your court either late today or tomorrow.

THE COURT: That's fine, counsel.

MR. SULKIN: Your Honor, we handwrote in a couple of surreply briefs that were filed after this was presented to the court and initialed that.

THE COURT: There is one order that's missing, and that's the one to deny motion for partial summary judgment on behalf of the plaintiffs.

MR. PETRAK: I think I included that in the "plaintiff's motion is denied." I did not include a statement there were questions of fact -- it just said -- the first paragraph of the order say plaintiff's motion is denied.

THE COURT: Counsel, we are in recess. Thank you.

(Proceedings adjourned at 10:54 a.m.)